Supreme Court, U.S.
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No. 09-965

In The Supreme Court of the United States

RUPERT M. POLLARD,

Petitioner,

v.

ESTATE OF MARIE A. MERKEL,
MATTHEW R. POLLARD, Independent Executor,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENT MATTHEW R. POLLARD, INDEPENDENT EXECUTOR

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
COUNTERSTATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	4
I. The Court Of Appeals Properly Applied *Burford* Abstention Because The Only Issue Raised Was Whether The Parties Were Divorced Or Married, Which Is A Domestic Relations Issue Of Special Interest To The State And Was Already Before The Texas State Courts	5
II. The Court Of Appeals Did Not Hold That The District Court Lacked Jurisdiction Under 28 U.S.C. § 2410, And Lack Of Jurisdiction Was Not A Basis For The Court Of Appeals' Application Of *Burford* Abstention	9
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES

Ankenbrandt v. Richards, 504 U.S. 689 (1992) 6, 9

Burford v. Sun Oil Co., 319 U.S. 315 (1943) .....*passim*

Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).....6, 7

Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1 (2004).....6

Estate of Merkel, No. 05-0375-P3 (Prob. Ct. No. 3, Dallas County, Tex., filed 14 Feb. 2005).....6, 10

Estate of Merkel v. Pollard, 2009 WL 3816961.....7, 8

In re Marriage of Merkel & Pollard, No. 05-08-01615-CV (Tex.App. – Dallas, filed 26 Nov. 2009).....1, 5

Marshall v. Marshall, 547 U.S. 293 (2006) 4, 10

Moore v. Sims, 442 U.S. 415 (1979) 8

Pollard ex rel. Estate of Merkel v. Pollard, No. 05-09091987-CV (Tex.App. – Dallas, filed 10 Sept. 2009).....1, 5

Pollard v. Merkel, No. 05-96-00795-CV, 1999 WL 72209 (Tex.App. – Dallas, 12 Feb. 1999, no pet.).....2

Pollard v. Merkel, 114 S.W.3d 695 (Tex.App. – Dallas, 2003, pet. denied) 3

Pollard v. Pollard ex rel. Estate of Merkel, No. 05-0375-P3(A) (Prob. Ct. No. 3, Dallas County, Tex., filed 8 Aug. 2005).....6

TABLE OF AUTHORITIES – Continued

Page

Pollard v. Pollard ex rel. Estate of Merkel, No. 05-0375-P3(B) (Prob. Ct. No. 3, Dallas County, Tex., filed 21 Oct. 2005) 6

STATUTES AND RULES

28 U.S.C. § 2410 ..... 3, 5, 9

Sup. Ct. R. 10 4

INTRODUCTION

This case is only part of the ongoing saga to determine the marital status of Petitioner Rupert M. Pollard ("Petitioner") and Marie A. Merkel ("Merkel") at the time of Merkel's death in 2004. In no less than five courts for more than five years, Petitioner and Respondent Matthew R. Pollard, Independent Executor of the Estate of Marie A. Merkel, Deceased ("Respondent") (and one of Petitioner and Merkel's two children), have pursued the exact same issue – whether Petitioner and Merkel were married or divorced at the time of Merkel's death.[1]

Based on the domestic relations nature of this case and the related pending state court litigation, the Fifth Circuit Court of Appeals held *sua sponte* that this "married *vel non* issue arising in Texas divorce proceedings easily falls within" the abstention doctrine under *Burford v. Sun Oil Co.*, 319 U.S. 315, 332-34 (1943) and dismissed the District Court case. Petitioner does not identify a circuit split, decision on an important federal question, or a substantial departure from the usual course of judicial

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[1] In fact, oral argument regarding the marital status issue will take place on April 28, 2010, in the Dallas Court of Appeals in *Pollard ex rel. Estate of Merkel v. Pollard*, No. 05-09091987-CV (Tex App – Dallas, filed 10 Sept. 2009) (appeal of probate court's denial of Pollard's motion for accounting), and in *In re Marriage of Merkel & Pollard*, No 05-08-01615-CV (Tex.App. – Dallas, filed 26 Nov. 2009) (appeal of divorce court's dismissal of divorce proceedings).

proceedings justifying certiorari review in this case. His petition for a writ of certiorari ("Petition") should be denied.

COUNTERSTATEMENT OF THE CASE[2]

Merkel and Petitioner were married in 1964. During the marriage, they acquired real property located at 4231 Beverly Drive, Dallas, Texas ("Beverly Residence"). In 1992, Merkel filed for divorce. On January 30, 1996, the Divorce Court entered a Divorce Decree dissolving the marriage and dividing the community property.

Petitioner appealed the property division to the Dallas Court of Appeals, but stated in his brief that he did *not* contest the dissolution of the marriage. In February 1999, the Dallas Court of Appeals reversed and remanded on the basis that the mediated settlement agreement was not effective to divide the marital property of the parties.[3] The dispute in this case centers on the legal effect of that reversal on the marital status of Petitioner and Merkel at her death. Respondent's position is that Petitioner's appeal of only the property division resulted in a severance, and the dissolution of the marriage became final in

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[2] References to the Petition are cited as "Pet. ___ "

[3] *Pollard v. Merkel*, No. 05-96-00795-CV, 1999 WL 72209 (Tex App. – Dallas, 12 Feb 1999, no pet.) (not designated for publication).

1996. After Merkel's death in 2004, Petitioner claimed that he and Merkel were married throughout the nine-year property division litigation, which remained pending at Merkel's death in the Dallas Divorce Court after a second judgment, appeal, and reversal and remand.[4]

Because of the existence of federal tax liens against Petitioner and Petitioner's refusal to sign a request for tax lien payoff, Respondent filed suit in the District Court for the Northern District of Texas ("District Court"), against Petitioner and the United States of America to quiet title to the Beverly Residence, and to establish that Petitioner had no interest in the Beverly Residence and, therefore, that such property was not subject to any federal tax lien issued against Petitioner or his property. This suit was initially brought by Respondent under 28 U.S.C. § 2410 against the United States and Petitioner. However, the extent of federal tax liens issued against Petitioner for failure to pay federal income taxes that existed at the time the suit was filed were ultimately not at issue in the case because the IRS failed to timely renew the federal tax liens against Petitioner so they lapsed. Thus, the sole threshold issue for determination by the District Court was whether Merkel and Petitioner were married or divorced at Merkel's death. If determined to be

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[4] *Pollard v. Merkel*, 114 S.W.3d 695 (Tex.App. – Dallas 2003, pet. denied).

married, Petitioner also raised issues related to potential rights afforded to a surviving spouse under the Texas Probate Code.[5]

As a threshold issue, the District Court determined whether Merkel and Petitioner were married or divorced as of the date of Merkel's death. Despite a prior ruling by the Probate Court Number Three of Dallas County, Texas, that Merkel and Petitioner were divorced at Merkel's death, the District Court held that they were married at Merkel's death. On appeal, the Court of Appeals *sua sponte* applied *Burford* abstention and held that the District Court should have abstained from exercising jurisdiction due to the domestic relations nature of the marital status issue and the pending state court litigation.

REASONS FOR DENYING THE PETITION

Petitioner does not identify any inter-circuit conflict or raise any important but unsettled federal question for resolution. Sup. Ct. R. 10. Rather, Petitioner's primary argument is that the Court of Appeals simply misapplied *Burford* abstention to this case. Pet. p. 7-13. This is a meritless argument, and one which does not justify granting the Petition. Petitioner's only other argument is that the District

[5] These issues, such as probate homestead, would implicate the probate exception. *See Marshall v. Marshall*, 547 U.S. 293 (2006) and footnote 7 *infra*.

Court had jurisdiction to apply state law and to determine the legal implications of prior state law decision under 28 U.S.C. § 2410. Pet. p. 13-16. This jurisdictional argument is not responsive or relevant to the question of whether abstention under *Burford* was proper.

I. The Court Of Appeals Properly Applied *Burford* Abstention Because The Only Issue Raised Was Whether The Parties Were Divorced Or Married, Which Is A Domestic Relations Issue Of Special Interest To The State And Was Already Before The Texas State Courts.

The Court of Appeals properly applied *Burford* abstention in this case because the threshold issue presented to the District Court by both parties and the only issue before the Court of Appeals on appeal was the status of the marital relationship between Merkel and Petitioner at Merkel's death. This purely domestic relations issue involves disputed questions of Texas divorce law and appellate procedure. The issue was not, as Petitioner urges, a construction of orders of the Texas divorce court and court of appeals. Pet. p. 11. In addition, the marital status issue was already before Texas state courts.[6]

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[6] *See Pollard ex rel Estate of Merkel v. Pollard*, No. 05-09091987-CV (Tex.App. – Dallas, filed 10 Sept. 2009) (appeal of probate court's denial of Pollard's motion for accounting); *In re Marriage of Merkel & Pollard*, No. 05-08-01615-CV (Tex.App. –

(Continued on following page)

Under the "domestic-relations exception," a federal court lacks jurisdiction to "issue divorce, alimony and child custody decrees." *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992). In addition, it might be appropriate for a federal court to abstain in a case involving "elements of the domestic relationship" even when divorce, alimony or child custody is not strictly at issue. *Id.*; *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004). In *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), this Court held that even if the elements of the domestic-relations exception are not exactly met, abstention by a federal court is called for "when a case presents 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.'" *Ankenbrandt*, 504 U.S. at 705-06 (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)). Such would be the case if a "federal suit were filed prior to the effectuation of a divorce, alimony, or child custody decree, and the suit depended on a determination of the status of the

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Dallas, filed 26 Nov. 2009) (appeal of divorce court's dismissal of divorce proceedings); *Estate of Merkel*, No. 05-0375-P3 (Prob. Ct. No. 3, Dallas County, Tex., filed 14 Feb. 2005) (administration of Merkel's estate); *Pollard v. Pollard ex rel. Estate of Merkel*, No. 05-0375-P3(A) (Prob. Ct. No. 3, Dallas County, Tex., filed 8 Aug. 2005) (petition for declaratory judgment on whether Merkel and Pollard were divorced at Merkel's death); *Pollard v. Pollard ex rel. Estate of Merkel*, No. 05-0375-P3(B) (Prob. Ct. No. 3, Dallas County, Tex., filed 21 Oct. 2005) (Pollard's unsecured property claims against the estate for various personal property).

parties." *Id.* at 706. The Court of Appeals found that this case presents exactly that situation. *Estate of Merkel v. Pollard*, 2009 WL 3816961 at *4.

The Court of Appeals analyzed five factors to determine whether *Burford* abstention was appropriate in this case, and concluded that "each of these factors overwhelmingly favors abstention here." *Estate of Merkel v. Pollard*, 2009 WL 3816961 at *5. First, the Court of Appeals considered whether the "claim may be in any way entangled in a skein of state law that must be untangled before the federal case can proceed." *Id.* Here, the Estate's federal quiet title action was found to be entangled in a skein of state law because the only issue before the District Court was the nature and extent of Petitioner's ownership interest in the Beverly Residence, which turns on Texas domestic relations law. *Id.*

Second, the Court of Appeals determined that unsettled issues of state law were raised regarding Texas domestic relations law and Texas appellate procedure. *Id.* at *6. The Estate maintained that the parties were divorced at Merkel's death because Petitioner did not appeal the dissolution of marital bonds issue in his 1996 appellate brief nor did he brief any error regarding the dissolution of marital bonds. As a matter of Texas law, the dissolution issue was severed, and remand was only of the property division, and the dissolution of marital bonds was final. However, Petitioner contends that because he did not file a notice of limitation of appeal, the entire divorce proceeding was allegedly on appeal, and

therefore, the remand was of the entire case, and the parties were not divorced. Though Respondent contends that the parties were already divorced at Merkel's death, the parties strongly disagree on the application of Texas law to the interplay of these Texas procedural rules in an appeal from a divorce decree and the effect on the marital status of Merkel and Petitioner at Merkel's death.

Third, Texas obviously has an interest in its domestic relations law because family relations are a traditional area of state concern. *Moore v. Sims*, 442 U.S. 415, 435 (1979). Fourth, Texas needs a coherent domestic relations policy for when and how a divorce ruling may be severed on appeal. *Estate of Merkel*, 2009 WL 3816961 at *6. As this case illustrates, Texas needs a coherent policy that will determine the marital status of parties during a potentially lengthy appeal (or appeals) of only their property division. Under Petitioner's position, the parties' marital status would remain uncertain until all appeals concerning any property disputes were resolved. Such delay and uncertainty presents complex state law issues regarding property ownership, debts, the ability to remarry, and the legitimacy of children.

Finally, Texas has a system of family courts, and these courts have experience and expertise in Texas divorce law that federal courts lack. *Id.* at *6. Based on the foregoing, the Court of Appeals held that "each of the five *Burford* factors overwhelmingly favors abstention." *Id.* at 7. Based on the pending state court litigation and the domestic relations nature of this

case, the Court of Appeals did not err in applying *Burford* abstention.

Petitioner argues that no domestic relations issue was involved because Merkel died while the remanded divorce case was pending, so "granting of a divorce was an impossibility." This argument has no merit because it begs the question in dispute – whether only the property division was remanded.

Petitioner also contends that *Burford* abstention does not apply because the District Court was not asked to issue a divorce decree. Pet. p. 8-11. But this argument confuses the "domestic relations exception" with the abstention doctrine. The domestic relations exception to jurisdiction is implicated when a federal court is asked to issue a divorce. *Ankenbrandt*, 504 U.S. at 703. Abstention is considered where "the elements of the domestic-relations exception are not precisely met." *Burford*, 319 U.S. at 315.

II. The Court Of Appeals Did Not Hold That The District Court Lacked Jurisdiction Under 28 U.S.C. § 2410, And Lack Of Jurisdiction Was Not A Basis For The Court Of Appeals' Application Of *Burford* Abstention.

Petitioner's only other argument is that the District Court had jurisdiction to apply state law and to determine the legal implications of prior state law decisions under 28 U.S.C. § 2410. Pet. p. 13-16. The

issue to which this argument is addressed is unclear because the Court of Appeals did not hold that the District Court lacked jurisdiction. The issue was not the District Court's jurisdiction but whether the District Court should have declined to exercise jurisdiction under *Burford* in this case.[7]

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[7] Although the Court of Appeals did not apply or analyze the probate exception to federal jurisdiction, it would appear that the District Court lacks jurisdiction based on the "probate exception." *See Marshall v. Marshall*, 547 U.S 293 (2006). The probate exception reserves to "state probate courts the probate or annulment of a will and the administration of a decedent's estate. . . " *Id.* at 311. Moreover, "a federal court may not exercise jurisdiction to disturb or affect the possession of property in the custody of a state court . . ." *Id.* at 310. As noted above in footnote 6, the *Estate of Merkel* was already pending in the Dallas Probate Court No. 3 at the time this suit was filed in the District Court, and the Beverly Residence was already in the custody and control of that court as part of the administration of the Estate.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that the Court deny the Petition.

Respectfully submitted,

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